Supreme Court, U.S.
FILED
JUL 11 1994
OFFICE OF THE CLERK

Nos. 93-762 and 93-1094

In the Supreme Court of the United States

OCTOBER TERM, 1993

JEROME B. GRUBART, INC., *Petitioner,*

v.

GREAT LAKES DREDGE & DOCK COMPANY, *Respondent.*

CITY OF CHICAGO, *Petitioner,*

v.

GREAT LAKES DREDGE & DOCK COMPANY and JEROME B. GRUBART, INC., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR THE PETITIONER JEROME B. GRUBART, INC.

BEN BARNOW
Counsel of Record
ALAN M. GOLDBERG
ALBERT CUELLER
BARNOW AND HEFTY, P.C.
105 W. Madison St., Ste. 2200
Chicago, Illinois 60602
(312) 621-2000

ROBERT A. HOLSTEIN
BRUCE J. GOODHART
ARON D. ROBINSON
HOLSTEIN, MACK & KLEIN
300 S. Wacker Dr., 32nd Fl.
Chicago, Illinois 60606
(312) 906-8000

WILLIAM J. HARTE
WILLIAM J. HARTE, LTD.
111 W. Washington Street
Suite 1100
Chicago, Illinois 60602
(312) 726-5015

PHILIP B. KURLAND
ALAN S. MADANS
ROTHSCHILD, BARRY & MYERS
55 W. Monroe Street
Suite 3900
Chicago, Illinois 60603
(312) 372-2345

Counsel for the Petitioner Jerome B. Grubart, Inc.

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

25 pp

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I.	
A JUST AND PROPER ADMIRALTY JURISDICTIONAL INQUIRY IS NOT ACHIEVED BY MECHANICAL APPLICATION OF *SISSON*, OR BY RELIANCE ON VESTIGIAL JURISDICTION FORMULAE	1
A. A *Kelly* Examination Is Harmonious With *Sisson*	1
B. The Admiralty Extension Act Does Not Address How The Different Types Of Activity Affect The Jurisdictional Nexus Test	9
II.	
THERE IS NO INDEPENDENT ADMIRALTY JURISDICTION UNDER THE EXTENSION ACT AND THE LIMITATION ACT	12
A. The Issues Have Not Properly Been Raised By Great Lakes	12
B. The Extension Act Does Not Independently Create Admiralty Jurisdiction	13
C. The Limitation Act Does Not Independently Create Admiralty Jurisdiction	15
CONCLUSION	18

TABLE OF AUTHORITIES

CASES	PAGE
Antoine v. Zapata Haynie Corp., 777 F. Supp. 1360 (E.D. Tex. 1991)	7
Astoria Federal Savings & Loan Ass'n v. Solimino, 501 U.S. 104 (1991)	14
Austin v. Unarco Indus., Inc., 705 F.2d 1 (1st Cir. 1983), *cert. dismissed*, 463 U.S. 1247 (1983)	6
Broughton v. Offshore Drilling, Inc. v. South Central Machine, Inc., 911 F.2d 1050 (5th Cir. 1990)	7, 11
Coats v. Penrod Drilling Corp., 5 F.3d 877 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1303 (1994), *reh'g granted*, 20 F.3d 614 (5th Cir. 1994)	7
Cochran v. E.I. duPont de Nemours, 933 F.2d 1533 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 881 (1992)	6
Crotwell v. Hockman-Lewis, Ltd., 734 F.2d 767 (11th Cir. 1984)	14
David Wright Charter Services, Inc. v. Wright, 925 F.2d 783 (4th Cir. 1991)	17
Dean v. Maritime Overseas Corp., 770 F. Supp. 309 (E.D. La. 1991), *aff'd*, 981 F.2d 1256 (5th Cir. 1992)	7, 14
Delta Country Ventures, Inc. v. Magana, 986 F.2d 1260 (9th Cir. 1993)	6, 7
Eagle-Picher Industries, Inc. v. United States, 846 F.2d 888 (3d Cir. 1988), *cert. denied*, 488 U.S. 965 (1988)	6, 11
Efferson v. Kaiser Aluminum & Chemical Corp., 816 F. Supp. 1103 (E.D. La. 1993)	7

Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972) 2, 3, 7, 10, 13, 16

Felix v. Arizona Dept. of Health Services, Goods, Vital Records Section, 606 F. Supp. 634 (D. Ariz. 1985) 14

Foremost Insurance Co. v. Richardson, 457 U.S. 668 (1982) 10, 16

Foster v. Peddicord, 826 F.2d 1370 (4th Cir. 1987), *cert. denied*, 484 U.S. 1027 (1988) 6

Fox v. Southern Scrap Export Co., 618 So.2d 844 (La. 1993) 7

Great Lakes Dredge & Dock Co. v. City of Chicago, 3 F.3d 225 (7th Cir. 1993) 2, 12

Guillory v. Outboard Motor Corp., 956 F.2d 114 (5th Cir. 1992) 17

In re Complaint of Sisson, 867 F.2d 341 (7th Cir. 1989), *rev'd on other grounds*, 497 U.S. 358 (1990) 17

International Brotherhood of Electrical Workers v. Hechler, 481 U.S. 851 (1987) 13

Johnson v. Colonial Pipeline Co., 830 F. Supp. 309 (E.D. Va. 1993) 7

Jorsch v. Le Beau, 449 F. Supp. 485 (N.D. Ill. 1978) 14

Keene Corp. v. United States, 700 F.2d 836 (2d Cir. 1983), *cert. denied*, 464 U.S. 864 (1983) 6

Kelly v. Smith, 485 F.2d 520 (5th Cir. 1974), *cert. denied*, 416 U.S. 969 (1974) ..... *passim*

LaMontagne v. Craig, 817 F.2d 556 (9th Cir. 1987) . 6

Lewis Charters, Inc. v. Huckins Yacht Corp., 871 F.2d 1046 (11th Cir. 1989) 17

Lowe v. Ingalls Shipbuilding, 723 F.2d 1173 (5th Cir. 1984) 6

Martin v. West, 222 U.S. 191 (1911) 16

Myhran v. Johns-Manville Corp., 741 F.2d 1119 (9th Cir. 1984) 6

Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969) 14

Oman v. Johns-Manville Corp., 764 F.2d 224 (4th Cir. 1985), *cert. denied*, 474 U.S. 970 (1985) ... 6

Ozzello v. Peterson Builders, Inc., 743 F. Supp. 1302 (E.D. Wis. 1990) 7

Palmer v. Fayard Moving and Transp. Corp., 930 F.2d 437 (5th Cir. 1991) 7, 11

Penton v. Pompano Construction Co., 976 F.2d 636 (11th Cir. 1992) 6, 11

Price v. Price, 929 F.2d 131 (4th Cir. 1991) ... 7

Richardson v. Harmon, 222 U.S. 96 (1911) 15, 16, 17

Rosado v. Wyman, 397 U.S. 397 (1970) 14

Sinclair v. Soniform, Inc., 935 F.2d 599 (3d Cir. 1991) 7

Sisson v. Ruby, 497 U.S. 358 (1990) ..... *passim*

Sohyde Drilling & Marine Co. v. Coastal Gas Producing Co., 644 F.2d 1132 (5th Cir. 1981), *cert. denied*, 454 U.S. 1081 (1981) 6, 14

Three Buoys Houseboat Vacations U.S.A., Ltd. v. Morts, 921 F.2d 775 (8th Cir. 1990), *cert. denied*, 112 S. Ct. 272 (1991) 17

Torres v. City of New York, 581 N.Y.S.2d 194 (N.Y. App. Div. 1992), *cert. denied*, 113 S. Ct. 1584 (1993) 7

Victory Carriers, Inc. v. Law, 404 U.S. 202 (1971) . 13, 16

Whitcombe v. Stevedoring Services of America, 2 F.3d 312 (9th Cir. 1993) 7

STATUTES AND OTHER AUTHORITY

28 U.S.C. § 1333(1) (1988) 12

46 U.S.C. § 181 (1988) 12, 15, 16

46 U.S.C. § 740 (1988) 9, 12, 14, 15, 16

Sen. Rep. No. 1593, 1948 U.S. Code Cong. & Adm. News 16

Nos. 93-762 and 93-1094

In the Supreme Court of the United States

OCTOBER TERM, 1993

JEROME B. GRUBART, INC., *Petitioner,*

v.

GREAT LAKES DREDGE & DOCK COMPANY, *Respondent.*

CITY OF CHICAGO, *Petitioner,*

v.

GREAT LAKES DREDGE & DOCK COMPANY and JEROME B. GRUBART, INC., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

REPLY BRIEF FOR THE PETITIONER JEROME B. GRUBART, INC.

ARGUMENT

I.

A JUST AND PROPER ADMIRALTY JURISDICTIONAL INQUIRY IS NOT ACHIEVED BY MECHANICAL APPLICATION OF *SISSON*, OR BY RELIANCE ON VESTIGIAL JURISDICTION FORMULAE.

A. A *Kelly* Examination Is Harmonious With *Sisson*.

The issue presented by this case is whether *only* the three questions raised in *Sisson v. Ruby*, 497 U.S. 358 (1990), may be asked in every instance to determine whether admiralty jurisdiction is appropriate. The mechanical, unbending application of the *Sisson* test by the Seventh Circuit is questioned by the petitioners in the face of a materially different factual situation than was present in *Sisson* or its predecessors. Respondent Great Lakes Dredge & Dock Company ("Great Lakes") seeks to make this case one of water-based parties versus land-based parties. It consequently says little, if anything, about the entities' differing activities and clamors against further re-examination of the *Sisson* test or its sterile application, no matter what the situation. Great Lakes' amicus, the Maritime Law Association ("MLA"), urges re-examination of *Sisson* even while it exhorts the Seventh Circuit's "faithful application" of it. Despite proven problems with *Sisson* in complicated factual scenarios as now before the Court, both Great Lakes and its amicus resist a totality of the circumstances approach first enunciated in *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1974), *cert. denied*, 416 U.S. 969 (1974), and followed by most of the Circuits after *Sisson*.[1]

---

[1] Contrary to Great Lakes' claim, Grubart has not urged abandonment of the *Sisson* test, and, in fact, has maintained all along that *Sisson* and *Kelly* are compatible with one another. It is the Seventh Circuit that rejected this reasoning and suggested

(continued...)

The three-pronged, situs/nexus test of *Sisson v. Ruby*, 497 U.S. 358 (1990), developed from what arguably was a much simpler test to apply—the strict locality test. The locality test was discarded by this Court in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), when its mechanical application generated absurd results. Great Lakes now envisions mass confusion in the lower courts if the purported imprecision and vagueness of a totality of the circumstances test, or any part of it, is allowed to infiltrate what it proclaims is a more practicable test, the *Sisson* three-pronged formula. *See* Resp. Br. 41. One wonders how it would have reacted in *Executive Jet* to the argument that the situs test should be augmented by a

---

[1] (...continued)

that *Kelly* does not survive *Sisson*. *See Great Lakes Dredge & Dock Co. v. City of Chicago*, 3 F.3d 225, 228 (7th Cir. 1993). Great Lakes was also a strong proponent of the compatibility of the two tests when it wanted to downplay the existence of a conflict among the Circuits:

> 1. "The *Kelly* test is simply an articulation of factors that may be, but after *Sisson* are not always, part of the general characteristics of the relevant activity." Brief for Respondent in Opposition at 13;
>
> 2. "Each of the Circuits which refer to the *Kelly* factors subjects each factor to this 'general characteristics' crucible as required by *Sisson*." *Id.* at 13-14;
>
> 3. "[W]hether or not the Seventh Circuit specifically identified each of the *Kelly* factors, the substance of the analysis, and the result yielded, is the same through adherence to *Sisson's* principles." *Id.* at 14; and
>
> 4. "This Court has acknowledged that these approaches are by no means incompatible." *Id.*

After certiorari was granted, Great Lakes reversed itself. Like the Seventh Circuit, it now claims that the *Kelly* inquiries are inappropriate after *Sisson*. Great Lakes Response Brief 36-37 ("Resp. Br.").

nexus prong—the original locality test contained as clear a jurisdictional line as one could ask for under the circumstances, but it was not equal to the task of addressing the "perverse and casuistic borderline situations" faced by the courts. *See Executive Jet*, 409 U.S. at 255. Those difficult scenarios will continue to plague the dockets and, unless one wants to resurrect inequities such as were engendered by the strict locality test, they require flexibility and reason, not rigidity and rote, in the jurisdictional analysis. This is the process the Court has pursued; it should not retreat from it because of an improvident demand for expediency.

Identification of a federal interest in the protection of maritime commerce has always been at the forefront of the nexus test, whether under *Sisson* or a totality of the circumstances approach such as *Kelly*. Great Lakes completely ignores this rationale. Neither the Seventh Circuit nor Great Lakes has identified what that interest is. Both are willing to assume such an interest follows *a fortiori* from *Sisson*. When properly applied that should be the case. But, in the difficult factual scenario, and certainly when the parties and the courts are in substantial disagreement over what constitutes the "incident" and the "activity" under *Sisson* (*see* n.3, *infra*), prudence and reason dictate that such an interest not be so lightly assumed and that the inquiry not be so narrowly confined.

The petitioners and the amicus for Great Lakes all see a problem with an admiralty jurisdiction test comprised solely of the three *Sisson* questions. Great Lakes, undoubtedly motivated by the result below, alone professes satisfaction with that test as applied by the Seventh Circuit. Ensconced with its Seventh Circuit ruling, Great Lakes insists without convincing explanation that the breadth provided by *Kelly* is not only unnecessary, but that it is imprecise

and manipulable. That argument rings hollow when Great Lakes must refer to *Sisson* as applied in this case as its model of clarity and precision.

Consider how Great Lakes has misemployed and manipulated the *Sisson* test in this litigation. In the Court of Appeals, it characterized the activity as pile driving from barges in a navigable channel. Ct. App. Br. of Great Lakes at 23. It did not explicitly define the incident, but discussed the potential impact on maritime commerce as arising from the pile driving work (*Id.* at 16-17, 37-38), so for all practical purposes, Great Lakes' view of the incident was the same as its activity.[2] In this Court, Great Lakes adopted the Seventh Circuit's notion of the two prongs: the activity was pile driving in a riverbed (Br. in Opp. at 12, 18) and the incident became *negligent* driving of pilings into a riverbed (*Id.* at 10-11, 18).

After this Court granted its writ of certiorari, Great Lakes re-evaluated its position; its chameleonic "activity" is now significantly generalized to the bootstrapping phrase, "maritime repair work." Resp. Br. 8, 28, 30. Its statement of the incident remains elusive—it is either "pile driving operations" (*Id.* 7) or *negligent* replacement of the dolphins (*Id.* 30), depending on where in the argument one happens to be. Great Lakes' interchanging highlights the error of the Seventh Circuit's construction of activity and incident. The fact remains that the Seventh Circuit mischaracterized the two concepts and compounded that error by making them equivalents.[3]

---

[2] At oral argument, however, Great Lakes repeatedly insisted that the incident was the flood.

[3] Each of the parties before the Court has its own version of the activity and incident. Grubart has defined the activity as bridge

(continued...)

Is there any wonder why the lower courts have found it necessary to rely on additional guidelines to establish the presence or absence of a significant relationship to maritime commerce activity? This matter amply illustrates the pitfalls of relying on the characterizations of incident and activity as the sole nexus criteria for admiralty jurisdiction, even before one adds the complexity of parties engaged in different activities.

Even the MLA recognizes the limitation of *Sisson* in the difficult situation. It predictably seeks a mechanical test to ensure the broadest possible boundaries for admiralty jurisdiction, if not through *Sisson*, then by its "modified situs test." The MLA's inclination is to abandon completely the nexus component and adopt a new bright-line test requiring only a vessel on navigable water. But that formulation was explicitly rejected in *Sisson* because it would not necessarily implicate a federal maritime interest. 497 U.S. at 364 n.2. The wisdom of that rejection is validated by the instant

---

[3] (...continued)
maintenance or repair and the incident as the breach of an underground tunnel. The City of Chicago ("City") says the activity is the operation and maintenance of the underground tunnel and the incident is the flooding of downtown building basements. The MLA leaves no stone unturned in striving to portray this as a maritime matter. Its activity is the "anchoring or mooring of a vessel to perform work in a navigational channel" (MLA Br. 16), and the incident is "a commercial vessel's perforation of a submerged tunnel structure, which drained substantial water from a navigable river, flooded the tunnel, communicated damage to nearby shore structures and disrupted maritime commerce by closing a navigable waterway to all maritime traffic." (*Id.* 15). Thus, the MLA's definition of the incident, when stripped of its pretextual ornamentation, bears a striking resemblance to Grubart's and none at all to the Seventh Circuit's characterization. That anomaly does not dissuade the MLA from asserting that the Court of Appeals made a "faithful" application of *Sisson*. *See* MLA Br. 13.

situation and numerous other cases where no maritime interest was implicated even though a vessel on navigable waters was involved.[4]

Creation of a completely new test is not the answer, nor is it necessary. Contrary to the remonstrations of Great Lakes and the MLA, the Circuits, except for the Seventh, *have* been able to discern when a broader *Kelly* inquiry is appropriate without encountering the vexing dilemmas discomforting the respondent and its amicus.[5] It should also

---

[4] *See, e.g., Foster v. Peddicord*, 826 F.2d 1370 (4th Cir. 1987) (diving injury off pleasure boat), *cert. denied*, 484 U.S. 1027 (1988); *Delta Country Ventures, Inc. v. Magana*, 986 F.2d 1260 (9th Cir. 1993) (diving injury off houseboat); *Penton v. Pompano Construction Co.*, 976 F.2d 636 (11th Cir. 1992) (construction worker injured in dismantling of equipment off barge); *LaMontagne v. Craig*, 817 F.2d 556 (9th Cir. 1987) (defamatory letter written from aboard a ship); *Sohyde Drilling & Marine Co. v. Coastal Gas Producing Co.*, 644 F.2d 1132 (5th Cir. 1981) (property damage from well-blowout on submersible drilling barge), *cert. denied*, 454 U.S. 1081 (1981).

The MLA's modified situs test would also have led to a different result in a long line of asbestos cases involving ship workers where the Circuits are in unanimous agreement that there is no admiralty jurisdiction because of a lack of substantial maritime connection. *See, e.g., Austin v. Unarco Indus., Inc.*, 705 F.2d 1 (1st Cir. 1983), *cert. dismissed*, 463 U.S. 1247 (1983); *Keene Corp. v. United States*, 700 F.2d 836 (2d Cir. 1983), *cert. denied*, 464 U.S. 864 (1983); *Eagle-Picher Industries, Inc. v. United States*, 846 F.2d 888 (3d Cir. 1988), *cert. denied*, 488 U.S. 965 (1988); *Oman v. Johns-Manville Corp.*, 764 F.2d 224 (4th Cir. 1985), *cert. denied*, 474 U.S. 970 (1985); *Lowe v. Ingalls Shipbuilding*, 723 F.2d 1173 (5th Cir. 1984); *Myhran v. Johns-Manville Corp.*, 741 F.2d 1119 (9th Cir. 1984); *Cochran v. E.I. duPont de Nemours*, 933 F.2d 1533 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 881 (1992).

[5] It is difficult to reconcile how the MLA can suggest a new jurisdiction test in the face of near universal adoption of *Kelly* (with or without reference to *Sisson*) by the courts. *See* MLA Br. 10-11,

(continued...)

have been done here—*Sisson* inherently requires such accommodation.

This Court has said that an indictment of the strict locality test was the number of times exceptions were made to it. *Executive Jet*, 409 U.S. 249, 259. A similar criticism of *Sisson* flows from the fact that few courts have been able to rely on it alone for guidance in the jurisdictional inquiry. The MLA candidly concedes that no federal court (except the Seventh Circuit) and only a few state courts have been able to apply *Sisson* without the support of a *Kelly*-like analysis. *See generally* cases cited at MLA Br. 11 n.9. Furthermore, to the extent there is confusion below, it lies with the proper application of the *Sisson* nexus prongs and the melding of the *Sisson* inquiries into the established *Kelly* test, not with the *Kelly* test itself. *See* MLA Br. 4; *see generally* cases cited at MLA Br. 11-12 n.10. Clearly, the confusion below emanates from *Sisson*, not *Kelly*. Yet, despite the proven track record of the totality of circum-

---

[5] (...continued)
citing, *Sinclair v. Soniform, Inc.*, 935 F.2d 599 (3d Cir. 1991); *Price v. Price*, 929 F.2d 131 (4th Cir. 1991); *Broughton v. Offshore Drilling, Inc. v. South Central Machine, Inc.*, 911 F.2d 1050 (5th Cir. 1990); *Dean v. Maritime Overseas Corp.*, 770 F. Supp. 309 (E.D. La. 1991), *aff'd*, 981 F.2d 1256 (5th Cir. 1992); *Coats v. Penrod Drilling Corp.*, 5 F.3d 877 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1303 (1994), *reh'g granted*, 20 F.3d 614 (5th Cir. 1994); *Johnson v. Colonial Pipeline Co.*, 830 F. Supp. 309 (E.D. Va. 1993); *Efferson v. Kaiser Aluminum & Chemical Corp.*, 816 F. Supp. 1103 (E.D. La. 1993); *Palmer v. Fayard Moving and Transp. Corp.*, 930 F.2d 437 (5th Cir. 1991); *Fox v. Southern Scrap Export Co.*, 618 So.2d 844 (La. 1993); *Delta Country Ventures, Inc. v. Magana*, 986 F.2d 1260 (9th Cir. 1993); *Whitcombe v. Stevedoring Services of America*, 2 F.3d 312 (9th Cir. 1993); *Antoine v. Zapata Haynie Corp.*, 777 F. Supp. 1360 (E.D. Tex. 1991); *Ozzello v. Peterson Builders, Inc.*, 743 F. Supp. 1302 (E.D. Wis. 1990); *Torres v. City of New York*, 581 N.Y.S.2d 194 (N.Y. App. Div. 1992), *cert. denied*, 113 S. Ct. 1584 (1993).

stances test, the MLA, without explanation, snubs it in favor of a rigid *Sisson* test or a rejected mechanical test. If the MLA wants to scrap *Sisson*, the logical alternative is already in place and in widespread use by the other Circuits.

A predictable, quick-fix admiralty jurisdiction test for every situation as imagined by Great Lakes and the MLA is not possible unless one is willing to compromise the inquiry for a federal maritime interest. Grubart has stated that a mechanical *Sisson* test might suffice in simple or obvious traditional maritime circumstances; there are simple, clear situations where even a strict locality test might suffice. But that does not mean that such tests should stand as bulwarks against thought and reason.

What is needed is a fair and workable test for every situation, including the complicated one. *Sisson* can be that test *if* it is properly construed to include considerations articulated under the totality of the circumstances test. The more expansive inquiry lessens the risk of error and de-emphasizes the search for *Sisson* definitions which are manipulable and susceptible to widely divergent interpretation, as exemplified by this litigation. The broader *Kelly* approach also takes into account the interests of all the relevant parties and entities, not just those who will contribute to a finding of maritime jurisdiction. Lastly, the multi-faceted examination of *Kelly* provides the flexibility necessary to forestall yet another visit to this Court to define the boundaries of admiralty jurisdiction while at the same time avoiding the return to rejected principles that would sacrifice justice for sophistic simplicity.

B. The Admiralty Extension Act Does Not Address How The Different Types Of Activity Affect The Jurisdictional Nexus Test.

Great Lakes has made the Admiralty Extension Act, 46 U.S.C. § 740, its salvation for every exigency represented by the non-maritime parties in this matter. Great Lakes is right to think that the land-based injuries here will require application of the Extension Act if the jurisdiction test is otherwise satisfied, but wrong to presume that injured parties can have no role in the independent nexus analysis because of their land status.

Great Lakes initially attempts to disqualify the injured land-based parties here by asserting that *Sisson's* footnote 3 reference to "instrumentalities" was not intended to be synonymous with "parties." Resp. Br. 31, *citing* 497 U.S. at 365 n.3. That is directly refuted by *Sisson* in its footnote 4:

> We believe that, at least in cases in which all of the relevant *entities* are engaged in similar types of activity (*cf. n.3, supra*) the formula . . . .

497 U.S. at 366 n.4 (emphasis added).[6] Second, Great Lakes argues that injured parties like Grubart have no relevant role in the nexus inquiry because they were not "involved in bringing about (being instrumental in) the alleged wrong." Resp. Br. 31. Great Lakes is clearly correct in its admission that such injured parties did not bring about the wrong, but this Court in *Sisson* never limited the relevant "entities" or "instrumentalities" to the tortfeasors, nor did it exclude injured parties from the inquiry. After all, unless one wants to become mired in the question of proximate cause (*Sisson* admonishes against such an inquiry at the

---

[6] The Court's meaning is also clear to Great Lakes' amicus. The MLA interchanges "instrumentalities" with "parties" while discussing the *Sisson* footnotes. *See* MLA Br. 16.

jurisdictional stage, 497 U.S. at 365), the injured parties in *Sisson*, the marina and the other boat owners, were not any more instrumental in bringing about the alleged wrong (Sisson's vessel fire) than Grubart and thousands of others were in contributing to the tunnel breach.

Thus, *Sisson* established a role for its land-based injured party (the marina) in its nexus analysis, but that party happened to be engaged in the same type of activity as the boat owner (storage and maintenance of vessels). Great Lakes realizes this: "*Sisson* itself involved damage to 'water-based' parties (the other yachts) and a 'land-based' party (the marina)." Resp. Br. 37. Great Lakes is so captivated by the injured parties' distant location in this matter that it cannot see past that point to the differing activity also represented by the City and parties such as Grubart. Consequently, Great Lakes is unable or unwilling to differentiate "land-based" from "non-maritime" and ignores examination of how the differing activities of the parties in this matter affect the nexus inquiry.

Clearly, a land-based injured party can have a role in the *Sisson* nexus inquiry. If an injured party in *Sisson* appeared to have a stronger connection to the "activity" than Grubart and the City do here, it is precisely because the *Sisson* entities, like those in *Executive Jet* and in *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982), were engaged in a common activity. That the injured parties in the case at bar have less of an affiliation with a maritime activity than the injured parties had in *Sisson* is undeniable and only serves to highlight the question raised, but not answered, in footnotes 3 and 4 of *Sisson*. Even if Great Lakes is found to have engaged in a maritime activity, Grubart, thousands of others like it, and the City were not. Without prejudice to Grubart's underlying contention that Great Lakes was not engaged in a traditional maritime

activity, the only difference between the parties in *Sisson* and the instant parties is the difference in their types of activity. There is no support in *Sisson* or anywhere else for excluding a party from the nexus inquiry because of its locality. In fact, the lower courts have regularly examined the relevant entities' different types of activity (maritime vs. non-maritime) under the nexus prong without regard to the situs of a party.[7]

The fallacy of Great Lakes' argument is exposed by its avoidance. Rather than address the obvious different types of activity present, Great Lakes has exploited the injured parties' *locality* to confine their role to the situs prong of the admiralty jurisdictional analysis. Imparting a role for land-based injured parties in the nexus inquiry does not make the situs prong meaningless. Examination of the situs question, and with it, the Extension Act, will not be affected.[8] In a situation where the showing of a substantial federal interest is in the balance, it would be a sham to banish entities and instrumentalities from the nexus inquiry because they are non-maritime in character and role.

---

[7] *See, e.g., Eagle-Picher Industries, Inc. v. United States*, 846 F.2d 888 (3d Cir. 1988) (asbestos-related injury to shipworker), *cert. denied*, 488 U.S. 965 (1988); *Palmer v. Fayard Moving and Transp. Corp.*, 930 F.2d 437 (5th Cir. 1991) (land-based employee of vessel owner slips while visiting vessel); *Broughton v. Offshore Drilling, Inc. v. South Central Machine, Inc.*, 911 F.2d 1050 (5th Cir. 1990) (vessel damaged by dropped oil-rigging machinery); *Penton v. Pompano Construction Co.*, 976 F.2d 636 (11th Cir. 1992) (construction worker injured in dismantling of equipment off barge onto land).

[8] Grubart has never argued that the mere existence of land-based injured parties mandates a finding of no admiralty jurisdiction.

II.

THERE IS NO INDEPENDENT ADMIRALTY JURISDICTION UNDER THE EXTENSION ACT AND THE LIMITATION ACT.

A. The Issues Have Not Properly Been Raised By Great Lakes.

Great Lakes has not properly raised whether the Admiralty Extension Act, 46 U.S.C. § 740, and the Limitation of Vessel Owner's Liability Act, 46 U.S.C. § 181, *et seq.*, provide independent grounds for admiralty jurisdiction in this matter. As to the Extension Act, Great Lakes' recitation of the record is not accurate. *See* Resp. Br. 41 n.26. It cited the Extension Act, along with 28 U.S.C. § 1333(1), as the bases for jurisdiction in its complaint (J.A. 31) and in the Seventh Circuit, but never independent of Section 1333(1). *See* Ct. App. Br. of Great Lakes at 4, 38-40; Ct. App. Reply Br. at 4-6, 16-17 ("Great Lakes is not advocating that the Extension Act creates a new cause of action."). *Compare, e.g.*, Ct. App. Br. of Great Lakes at 41 n.10 (referencing Limitation Act only); Ct. App. Reply Br. at 17 (referencing Limitation Act only).[9] The parties have not briefed and

---

[9] Moreover, Great Lakes claims that the Seventh Circuit had no reason to discuss whether the Extension Act alone conferred jurisdiction because it found jurisdiction under Section 1333. The court made such a statement with respect to the Limitation Act *but not the Extension Act*:

> Because we conclude that 28 U.S.C § 1333 adequately supports . . . jurisdiction, we do not address Great Lakes' contention that the Limitation Act is an independent source of subject matter jurisdiction.

3 F.3d at 230 n.8. The court's obvious failure to similarly comment about the Extension Act, on this record as explained above, leads to only one conclusion—the court did not believe the issue of independent jurisdiction under the Extension Act was before it.

argued the Extension Act question below, and it should not be raised for the first time in this Court.

As to independent jurisdiction under the Limitation Act, Great Lakes did not raise it in its complaint, but only in its response to Grubart's and the City's motions to dismiss in the district court. (Memorandum In Opposition To Motions To Dismiss at 13 n.8) In the appellate court, cursory mention was made in a single footnote reference (Ct. App. Br. of Great Lakes at 41 n.10) and in its reply brief (Ct. App. Reply Br. of Great Lakes at 17). Until now, the issue has not been suggested to this Court. It is not in Great Lakes' Brief in Opposition, nor is it stated or implied in its Question Presented therein. Lastly, as with the Extension Act, Great Lakes did not cross-petition on this issue. The Court should, in exercising its discretion, refuse to consider those arguments until they are fully argued to the Seventh Circuit and ruled upon. *See, e.g., International Brotherhood of Electrical Workers v. Hechler*, 481 U.S. 851, 865 (1987).

B. The Extension Act Does Not Independently Create Admiralty Jurisdiction.

There is no sound reason why federal admiralty jurisdiction should be created under the Admiralty Extension Act ("Act") if the action cannot qualify as a maritime tort using a nexus test. The Act extends admiralty jurisdiction when the injury occurs on land and corrects an inequity created by the strict locality test, which has since been rejected. *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972). Congress enacted the legislation in 1948 to cure the inequities of the then-prevailing judicial interpretation of Section 1333(1) which withheld admiralty jurisdiction when land damage occurred, even though it would otherwise have been an admiralty action. *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 209 and n.8 (1971); *Executive Jet*,

409 U.S. at 260. The Act also permitted shoreside interests to bring suits in admiralty for damage caused by vessels. *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 222 (1969).

The Circuits addressing the issue have uniformly held that the Extension Act does not independently create admiralty jurisdiction.[10] Great Lakes practically concedes that its construction of the Act results in the anomaly that torts consummated on land are preferred over torts consummated at sea under existing admiralty law. Resp. Br. 44 n.29. According to Great Lakes, that result is avoided *if* one adopts a new test such as proposed by the MLA and the concurring opinion in *Sisson* (Scalia, J., concurring), imposing maritime jurisdiction for every tort occurring on a vessel in navigable waters. Of course, if such a test should develop, the Extension Act would become meaningless. Great Lakes, earlier in its brief, did "not think this Court should embrace an analysis that would render an Act of Congress [the Extension Act] meaningless." Resp. Br. 12 n.4, *citing Astoria Federal Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991) and *Rosado v. Wyman*, 397 U.S. 397, 415 (1970).

The Extension Act must be read against Congress' appreciation of the jurisdiction test as it existed in 1948. The Act does not define what an admiralty case is nor is there an indication that Congress intended to define it. If

---

[10] *See, e.g., Sohyde Drilling & Marine Co. v. Coastal States Gas Producing Co.*, 644 F.2d 1132 (5th Cir. 1981), *cert. denied*, 454 U.S. 1081 (1981); *Crotwell v. Hockman-Lewis, Ltd.*, 734 F.2d 767 (11th Cir. 1984); *Dean v. Maritime Oversees Corp.*, 770 F. Supp. 309, 319 (E.D. La. 1991), *aff'd*, 981 F.2d 1256 (5th Cir. 1992); *Felix v. Arizona Dept. of Health Services, Goods, Vital Records Section*, 606 F. Supp. 634, 636 (D. Ariz. 1985); *Jorsch v. Le Beau*, 449 F. Supp. 485, 488-89 (N.D. Ill. 1978).

Congress wanted maritime jurisdiction to exist for every tort caused by a vessel in navigable waters, it could have easily said so and dropped the last phrase, "notwithstanding that such damage or injury be done or consummated on land." The inclusion of that language and the legislative history of the Act establish that Congress' purpose was limited to correcting perceived inequities in the strict locality test. The nexus test does not resurrect those problems nor does it impair the legislative objectives embodied by the Act. For these reasons, the Admiralty Extension Act should not be interpreted to confer jurisdiction independent of Section 1333(1).

C. The Limitation Act Does Not Independently Create Admiralty Jurisdiction.

The Limitation of Liability Act was enacted for the purpose of promoting maritime commerce. *Richardson v. Harmon*, 222 U.S. 96, 104 (1911). As previously stated, the Admiralty Extension Act afforded shoreside interests the same opportunity to bring suits in admiralty as was available to vessel owners. Prior to that enactment, the strict locality test prevented those shoreside interests from bringing suits in admiralty for damages caused by vessels engaging in maritime commerce on navigable waters. But for the Court's ruling in *Richardson*, the locality test would also have worked a similar inequity on shipowners seeking to limit their liability under the Limitation Act for land-based injuries caused by their maritime activities, *i.e.*, "non-maritime torts."

In view of its purpose to promote maritime commerce, the Limitation Act was liberally construed in *Richardson* so as to overcome the artificial limitation on admiralty jurisdiction imposed by the strict locality test. In *Richardson*, the owners of a commercial barge were allowed to limit

their liability for damage to a bridge caused by the collision of their barge with a bridge abutment, even though, under the admiralty jurisdiction test of the day, the claim was not otherwise cognizable in admiralty. As Congress was to realize and correct decades later, a quintessential maritime activity could be transformed into a non-maritime action simply by the existence of land-based injuries.

Great Lakes makes much ado about the proposition that the Extension Act was not a response to *Richardson*, and, therefore, *Richardson* survives. The legislative history of the Extension Act makes clear that it was more a response to cases such as *Martin v. West*, 222 U.S. 191 (1911), where it was held that maritime jurisdiction did not extend to cover losses on land (*Martin* also involved a vessel-bridge collision, but not the Limitation Act), even if the cause of the loss originated on a navigable waterway. *See* Sen. Rep. No. 1593, 1948 U.S. Code Cong. & Adm. News, p. 1899; *see also, Victory Carriers, Inc. v. Law*, 404 U.S. 202, 209 and n.8 (1971); *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 260 (1972). Regardless of the relationship to *Richardson*, however, the result is the same. The Court in *Richardson*, and later Congress through the Extension Act, removed the locality of the injury as an impediment to a finding of admiralty jurisdiction for torts clearly arising out of traditional maritime activities. Therefore, the Extension Act need not be viewed as a response to *Richardson* for the statute to have eliminated the reason and need for the rule established by that case.

The advancement of a competitive American shipping industry is not impeded by requiring that a claim also have a substantial relationship to traditional maritime activities as required by *Executive Jet*, *Foremost*, and *Sisson*. The Limitation Act's purpose of promoting commercial shipping is the same as, or at the very least, is a subpart of, the

same federal interest in the protection of maritime commerce that is the cornerstone of the totality of the circumstances test (or liberal *Sisson* test) urged by Grubart. Under that jurisdictional test, consideration of the activities of non-maritime entities and instrumentalities will or will not lead to identification of a federal interest sufficient to justify invocation of admiralty jurisdiction. If such a comprehensive analysis does not identify a significant relationship to traditional maritime activity, there is no other federal interest capable of justifying application of the Limitation Act.

Great Lakes argues that it is entitled to limitation of liability and independent admiralty jurisdiction even when a *Kelly* or *Sisson* jurisdictional inquiry identifies no substantial federal interest. At least five other Circuits, including the Seventh Circuit, disagree and have held that the Limitation of Liability Act does not independently support admiralty jurisdiction.[11] The concept of "non-maritime torts" in *Richardson* is no longer current under contemporary jurisdiction tests and to apply *Richardson* as if it is would be an absurdity. Insistence on federal jurisdiction in such situations does not further the purposes of the Limitation Act and only serves to unfairly make injured parties the subsidizers of shipowners' tortious conduct.

---

[11] *See, e.g., David Wright Charter Services, Inc. v. Wright*, 925 F.2d 783, 785 (4th Cir. 1991); *Guillory v. Outboard Motor Corp.*, 956 F.2d 114, 115 (5th Cir. 1992); *In re Complaint of Sisson*, 867 F.2d 341, 348-350 (7th Cir. 1989), *rev'd on other grounds*, 497 U.S. 358 (1990); *Three Buoys Houseboat Vacations U.S.A., Ltd. v. Morts*, 921 F.2d 775, 779-80 (8th Cir. 1990), *cert. denied*, 112 S. Ct. 272 (1991); *Lewis Charters, Inc. v. Huckins Yacht Corp.*, 871 F.2d 1046, 1052-54 (11th Cir. 1989).

CONCLUSION

The judgment of the Court of Appeals for the Seventh Circuit should be reversed and the judgment of the district court, denying admiralty jurisdiction, should be reinstated.

Respectfully submitted,

BEN BARNOW
Counsel of Record
ALAN M. GOLDBERG
ALBERT CUELLER
BARNOW AND HEFTY, P.C.
105 W. Madison St., Ste. 2200
Chicago, Illinois 60602
(312) 621-2000

ROBERT A. HOLSTEIN
BRUCE J. GOODHART
ARON D. ROBINSON
HOLSTEIN, MACK & KLEIN
300 S. Wacker Dr., 32nd Fl.
Chicago, Illinois 60606
(312) 906-8000

WILLIAM J. HARTE
WILLIAM J. HARTE, LTD.
111 W. Washington Street
Suite 1100
Chicago, Illinois 60602
(312) 726-5015

PHILIP B. KURLAND
ALAN S. MADANS
ROTHSCHILD, BARRY & MYERS
55 W. Monroe Street
Suite 3900
Chicago, Illinois 60603
(312) 372-2345

Counsel for the Petitioner
Jerome B. Grubart, Inc.

July 11, 1994